Enforcing the Code on Range Land in Oliver, BC

Complaint Investigation 000267

FPB/IRC/44

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The Investigation

On September 25, 2000, the Board received a complaint from an Oliver, B.C. resident. The complainant lives on White Lake Road, a paved rural road that passes through Crown range land in the Penticton Forest District. The road provides an alternative route to a 100-home subdivision and a golf course.

The complainant stated that a local rancher repeatedly allowed his cattle to graze on Crown land without authorization, and that due to a lack of fence maintenance, the cattle frequently escaped from the range onto White Lake Road, posing a safety hazard to motorists.

The complaint is not about the rancher, but rather the Ministry of Forests (MOF). The complainant considers that ministry enforcement efforts have been inappropriate because, despite the ministry's actions, the cattle continue to graze on Crown range without authorization. The complainant feels frustrated by what he considers to be a lack of action on the ministry's part, and he fears for his family's and the public's safety. The complainant feels that the ministry should have seized the licensee's cattle.

The Board decided to investigate whether or not government enforcement of *Forest Practices Code of British Columbia Act* (the Act) requirements was appropriate in the circumstances of the complaint.

Background

Grazing licences authorize a licensee to use Crown land for grazing cattle. In 1993, a rancher (the licensee) received a grazing licence from the ministry for land near the complainant's home.

Starting in the summer of 1995, the ministry began to document incidents of the licensee's cattle grazing on Crown pastures without authority, in contravention of the Act. The licensee was supposed to move his cattle from one pasture to another according to a grazing schedule, but did not follow the schedule.

Another rancher who used some of the same pastures as the licensee, but on a different schedule, wrote to the district manager in 1997 explaining that the licensee's trespassing cattle were affecting him economically. The trespassing cattle were grazing the forage in pastures allocated for his cattle, interbreeding between the two herds was occurring, and he had to spend many hours repairing fences and rounding up the licensee's cattle. The rancher stated that the lack of ministry enforcement was driving him out of business. Subsequently, the district manager provided the complaining rancher with alternative grazing arrangements.

Holders of grazing licences are required by section 27(1) of the Act to enter into a range use plan with the ministry. A range use plan describes the range and livestock management measures that will be implemented to ensure that range land is protected. In 1998, the complainant wrote to the district manager objecting to the approval of a range use plan for the licensee because he

was convinced that the licensee could not or would not meet the objectives of the plan. The complainant felt that the licensee was incapable of managing his herd, repairing fences, checking gates and developing water sources.

The ministry issued verbal and written instructions to the licensee, but the contraventions did not stop. On June 2, 1998, the ministry issued a stop-work order that instructed the licensee to cease grazing livestock on Crown range. The following week, when it became apparent that the licensee was not complying with the stop-work order, the ministry made plans to seize the cattle. However, the planned seizure was called off because ministry inspections revealed that the licensee made reasonable efforts to remove his cattle. The stop-work order remained in effect until the end of the 1998 grazing season.

Further ministry inspections revealed that the licensee continued to contravene the stop-work order allowing his cattle graze on Crown range. On July 17, 1998, the district manager determined that the licensee failed to graze his livestock in accordance with the Act and a range use plan, and that he permitted his livestock to graze on Crown range without authority. The contraventions took place between July 5, 1995 and July 14, 1998. The district manager levied a $4,000 administrative penalty against the licensee. Subsequently, the licensee appealed the district manager's fine to the Forest Appeals Commission. The commission upheld the decision and penalty on July 20, 1999. The licensee has not yet paid the penalty.

In early October 1998, the complainant was driving home along White Lake Road after dark and he narrowly missed a black cow on the road. The complainant wrote to the district manager, stating that the licensee's cows were regularly on the road. The complainant attributed the presence of the cows on the road to "poor, if not non-existent fence repair" by the licensee and the ministry's inability to enforce the conditions of the grazing licence. The complainant warned the district manager that the cows could cause serious injury or loss of life.

On October 26, 1998, the complainant met with the district manager to discuss the licensee's lack of cattle management. The complainant raised concerns about cattle on White Lake Road, public safety and overgrazing. In a letter dated October 28, 1998, the district manager suggested to the complainant that he continue to contact the licensee, as it was the licensee's responsibility to remove his cattle from the road. The district manager also stated that he would address the issue of cows on the road with the licensee as a priority item.

The cattle continued to trespass during the following grazing season. On May 25, 1999, district staff wrote to the licensee ordering that trespassing cattle be removed from Crown range. The letter stated that if the cattle were not removed by June 4, 1999, they would be seized.

The district manager was concerned about the risk presented by the trespassing cattle. On June 1, 1999, the district manager wrote to the licensee and stated that "there continue to be unacceptable risks with respect to public safety, impacts on third parties and environmental impacts." For those reasons, the district manager suspended the licensee's grazing licence, effective June 7, 1999. The district manager lifted the suspension on June 25, 1999 after the licensee signed a range use plan amendment, in effect committing to manage the cattle to meet the obligations of the plan.

Nevertheless, the cattle continued to trespass, and on July 20, 1999, the district manager notified the licensee that he intended to suspend the grazing licence for a second time. That suspension took effect on July 26, 1999. The contraventions continued, and the district manager notified the licensee on August 26, 1999 that the grazing licence would be cancelled effective November 30, 1999. Section 36 of the *Range Act* requires a district manager to serve notice of a cancellation on a licensee at least three months before the cancellation becomes effective.

On November 1, 1999, Crown counsel approved the first of what was to be two sets of charges against the licensee for grazing cattle in contravention of the Act. This first set of charges covered a period from June 8, 1998, to November 17, 1999.

The licensee appealed the cancellation of his grazing licence to the Forest Appeals Commission (FAC), and hearings concluded on April 12, 2000. The complainant gave evidence at the appeal.

With his grazing licence cancelled, the former licensee did not have authority to graze his cattle on Crown range, so he made arrangements to graze his cattle on private land adjoining the Crown range. But by May 2000, the private land had been grazed over, and his cattle moved back to Crown range. The ministry documented the trespasses throughout the grazing season and sent numerous notices to the former licensee, instructing him to remove the cattle from the Crown range. The former licensee did not comply, and the ministry proposed a second set of charges against the former licensee. On December 15, 2000, Crown counsel approved the second set of charges for grazing cattle in contravention of the Act. The second set of charges covered a period from May 12, 2000 to October 2000.

On December 27, 2000, a judge postponed the trial of the former licensee on the first set of charges.

The FAC released its decision on the former licensee's appeal on February 1, 2001. The FAC confirmed the district manager's decision to cancel the grazing licence.

Crown counsel withdrew both sets of charges in April 2001. Accordingly, prosecution of the former licensee is no longer being pursued.

A summary of the ministry's enforcement actions appears in Table 1.

Table 1 - Summary of enforcement actions

Enforcement action (in order of escalating severity)	*Date of action*	*Details*
Verbal instructions	Various, beginning in 1993	Discontinued on May 26, 1998
Notice of Contravention	Various	Continued throughout the 2000 grazing season
Written Instructions	Various	Began October 7, 1995
Stop-work order	June 2, 1998	Effective for the duration of the 1998 grazing season
Administrative penalty ($4,000)	July 17, 1998 - upheld by the Forest Appeals Commission on July 20, 1999	Penalty covered contraventions between July 5, 1995 and July 14, 1998
Licence suspension 1	June 1, 1999	Effective June 7, 1999. Rescinded June 14, 1999
Licence suspension 2	July 20, 1999	Effective July 26, 1999
Licence cancellation	August 26, 1999	Effective November 30, 1999
Prosecution 1	Charges approved November 1, 1999 - trial postponed on December 27, 2000	Charges covered the period from June 8, 1998 to November 17, 1999 - charges withdrawn in April 2001
Prosecution 2	Charges approved by Crown counsel on Dec. 15, 2000	Charges covered the period from May 12, 2000 to October 2000 - charges withdrawn in April 2001

Investigation Findings

The purpose of enforcement is to promote compliance with the Code. To assess the appropriateness of government enforcement in achieving compliance with the Code, the investigation examined the following:

- Was ministry enforcement effective in detecting contraventions of the Act?
- Was an appropriate range of enforcement measures used to encourage compliance?
- Were enforcement measures effective in achieving compliance?

A ministry training guide confirms that sound judgement is required to determine the appropriate enforcement action for a particular incident of non-compliance. An appropriate enforcement action "is one that is punitive enough to remove the incentive for non-compliance without being overly severe." Enforcement activities generally begin with monitoring and inspections. If problems are discovered, there are a number of tools available to the ministry to promote compliance. These tools escalate in severity and include written instructions, stop-work orders, administrative penalties, prosecution and licence cancellation. The complete range of enforcement options available to the ministry, in order of severity, is shown in Appendix 1.

Was ministry enforcement effective in detecting contraventions of the Act?

Field inspections and monitoring are the most common activities in the ministry's enforcement program. Between July 5, 1995 and October 31, 2000, 125 ministry field inspections revealed incidents of the licensee's cattle grazing on Crown range without authority. The bulk of the inspections were carried out during the grazing season, between May and November of each year. Ministry inspections were frequent, numerous and effective at revealing contraventions of the Act. The Board notes that this is an unusually large number of field inspections for a range tenure.

Finding #1

Ministry enforcement was effective in detecting contraventions of the Act.

Was an appropriate range of enforcement measures used to encourage compliance?

Not all of the enforcement actions listed in Appendix 1 are applicable to range enforcement. Table 1 shows that the enforcement measures taken by the ministry escalated in severity from verbal instructions to, ultimately, cancellation of the licence and prosecution. All enforcement options available to the ministry in the circumstances were taken except seizure of the cattle. Section 115(8) of the Act permits an "official" to seize livestock if he or she determines that a person has permitted cattle to graze on Crown land without authority in contravention of section 98 of the Act.

The complainant believed that the ministry should have seized the cattle so they could no longer stray onto White Lake Road and pose a potential hazard to motorists.

During the summer of 1999, district management staff met on several occasions to discuss their options. Management decided that seizure would only be considered if there were significant concerns about environmental impacts, public safety or impacts on third parties. In the opinion of one manager, seizure might place an additional, unreasonable hardship on the licensee. More importantly, the district manager explained that seizure could also be difficult and expensive for government. For example, the cattle freely roamed between Crown and private land. That presented difficulties because the ministry could not seize cattle from private land.

On July 30, 1999, a ministry manager sent a fax to the licensee stating that "it is not our intention to take any seizure action at this time unless it comes to our attention that there are incidents involving public safety, environmental damage or impacts on third parties. These incidents would have to be of some significance and I am not aware of any incidents at this time." The manager sent another fax to the licensee on August 26, 1999 confirming that the ministry did not intend to seize the cattle. The manager explained that he sent the faxes because he wanted to be forthright about the ministry's intentions. He stated that unless there was a compelling reason such as environmental damage or a safety issue, it was unlikely the ministry would seize the cattle.

Ministry field staff were informed that seizure was not planned, and they were instructed by management to observe, record and report further instances of non-compliance.

In order to determine if an appropriate range of enforcement actions was used, the Board considered whether there were actual significant incidents involving public safety, environmental damage or impacts on third parties after July 30, 1999.

a) Public Safety

The complainant was concerned about the possibility of someone being injured in a collision with a cow. He called the ministry to report four separate incidents of the licensee's cattle on White Lake Road in November 1999. He called in at least three more reports between May and October 2000.

The district manager informed the Board that whenever the licensee was contacted about cattle on the road, the licensee did remove them. However, the Board is aware that this did not prevent the cattle from escaping repeatedly through poorly maintained fences and getting back onto the road.

On August 29, 2000, another member of the public complained to the RCMP that the licensee's cattle were continually getting on to White Lake Road. The complaint was forwarded to the ministry. The ministry inspected the range on August 30, 2000. Cattle were observed grazing on Crown range without authority but they were not seen on White Lake Road.

Although there were reports of cattle on White Lake Road after July 30, 1999, there is no evidence of any actual incidents involving public safety.

b) Environmental Damage

In his August 26, 1999 rationale for cancelling the licensee's grazing licence, the district manager considered the impact of the repeated contraventions on the environment:

> "I believe from viewing the range with the agrologist and from previous representation that detrimental changes are happening, however I also feel strongly that it should not be necessary to have to witness range degradation to the point where it is evident before taking action."

The district manager explained to the Board that, after viewing the range, he felt that the detrimental changes that were occurring would eventually become unacceptable unless the licensee improved his management practices. However, he did not consider that the current impacts were unacceptable.

Although ministry inspections revealed cattle grazing on Crown land without authorization throughout 1999 and 2000, the ministry did not report any incidents of significant environmental damage.

c) Impacts on Third Parties

In his August 26, 1999 rationale for cancelling the licensee's grazing licence, the district manager said he considered the impact of the licensee's cattle on other stakeholders as follows:

> "This continues to be an issue however I have given it a decreased emphasis in my decision making process. While it continues to happen, it is less evident as to what the effect may be. Some of these conflicts are occurring on areas that are private property surrounding the Crown range however it does involve staff time as complaints are put forward."

In his August 26, 1999, letter cancelling the licensee's grazing licence, the district manager stated that the licensee's actions caused "inconvenience and expense for range co-users and neighbours." The district manager recognized that the licensee was impacting third parties, but he placed less emphasis on those impacts in his decision-making process.

In summary, the district manager was not aware of any incidents after July 30, 1999 that caused him significant concern about the impact of the trespassing cattle on the environment, public safety or third parties. Therefore the district manager did not consider seizure of the cattle.

As an alternative to seizing the cattle, the district manager cancelled the grazing licence on August 26, 1999. The cancellation was effective November 30, 1999. The district manager informed the Board that this was the first time a grazing licence had been cancelled in the province. The district manager stated that the cancellation would mean that the problem could be resolved by May 2000, the beginning of the next grazing season, because the licensee would not have authority to graze his cattle on Crown land.

Nevertheless, by the summer of 2000, the former licensee's cattle were once again grazing on Crown land without authority. At that time, the Forest Appeals Commission (FAC) had not released a decision on the licensee's appeal of the grazing licence cancellation.

The district manager stated that seizure could have been effective at that time, however his expectation that a decision from the FAC was imminent complicated matters. *Range Act* regulations require that a decision on an appeal must be made within 21 days of a hearing, so the district manager had good reason to expect that a decision would be released soon. He considered that the delay could mean the appeal was about to be upheld and the grazing licence reinstated. The district manager explained that he did not want to seize cattle in the absence of a FAC decision because he thought government might become liable if the FAC ruled in favour of the complainant. The district manager advised the Board that he was cautious because the licensee had challenged most of his decisions in the past.

In addition, the district manager considered that seizure would be difficult because the cattle were scattered across Crown and private land. He also considered the expense of seizing and boarding the cattle and the liability of looking after them.

The district manager was also aware that ministry staff were gathering evidence to lay charges against the former licensee. For all these reasons, the district manager said he did not consider the additional step of seizure necessary to protect the Crown's financial interest.

Meanwhile, the former licensee's cattle grazed on Crown land without authority throughout the 2000 grazing season. According to the ministry, the former licensee removed most of his herd from Crown land by October 2000, but the complainant stated that some cattle remained on the range until December 2000. The ministry continued to document incidents of trespassing cattle, and continued to send the former licensee letters instructing him to remove his cattle from Crown range.

With the exception of seizure, the ministry used all of the enforcement tools available in its attempts to achieve compliance. Although seizure was not used, there is no requirement that the ministry employ every enforcement action available, in any particular order. Discretion is required to determine the appropriate action in the circumstances to encourage compliance. In this case, the district manager turned his mind to the possibility of seizure and made it clear to his staff when seizure would be considered. The district manager used his discretion and did not consider that the environment, public safety or third parties would be significantly impacted by the contraventions. Therefore, seizure was not undertaken.

The Board is not convinced that the difficulties and cost of seizing the cattle, as cited by the district manager, would have outweighed the potential benefits. The Board notes that the only time the licensee reacted effectively was when seizure was imminent in June 1999. However, the Board acknowledges that the district manager was expecting a decision from the FAC, and that preparation for a prosecution was underway. The district manager used his discretion to determine appropriate actions from the range of alternatives available to him. Ministry enforcement escalated in severity when less severe measures proved ineffective. The Board considers that the ministry used an appropriate range of enforcement tools in its efforts to achieve compliance.

Finding #2

The ministry used an appropriate range of enforcement tools in its efforts to achieve compliance.

Were enforcement measures effective in achieving compliance?

To date, ministry enforcement has not been effective at encouraging the licensee to comply with the Code. As of December 2000, some of the former licensee's cattle continued to graze on Crown land without authority. However, enforcement was ongoing and the Board appreciates that this is an extraordinary case.

Finding #3

Ministry enforcement efforts have not been effective in achieving compliance to date.

Commentary

In this specific case, the district manager made a distinction between impacts and risks. In his June 1, 1999 letter suspending the grazing licence, he stated that "there continues to be

unacceptable risks with respect to public safety, impacts on third parties and environmental impacts." And later, on July 30, 1999, the ministry advised the licensee that "unless it comes to our attention that there are incidents involving public safety, environmental damage or impacts on third parties," seizure of cattle would not occur. In the Board's view, waiting for an actual incident or impact to occur with respect to public safety provides little comfort to those faced with the issue on a daily basis, and is unacceptable.

On October 17, 2000, a ministry manager assessed the safety risk with respect to cattle on White Lake Road. He did this by contacting the RCMP, a road maintenance contractor and a person who specifically complained to the RCMP. The manager concluded that, apart from the reports from the complainant and the complaint to the RCMP, "there appeared to be no compelling information to support a conclusion that there is any abnormal safety hazard with respect to intermittent cattle on White Lake Road. There is no conclusive proof that would lead us to believe that the problem will be any greater than previous years. " The assessment concluded that the risk of cattle on the road was low to moderate.

The Board is perplexed that the assessment put little weight on repeated concerns and reported incidents from specific individuals. In light of the number and duration of public complaints about cattle on White Lake Road, and the wellbeing of people who must travel the road, it concerns the Board that the ministry did not formally assess the risk to public safety until October 2000. This was after the Board's investigation work began, and many years after the complainant first brought the safety issue to the attention of the district manager.

The district manager ought to have placed greater weight on public safety risks and assessed that risk much earlier. As well, he should have considered additional measures to reduce the risks of an accident involving cattle on White Lake Road, since enforcement was never effective in removing those risks. For example, road signs could have been posted to caution drivers to watch for cattle, or the ministry could have arranged for the fences to be repaired. The risk to public safety should have been mitigated while enforcement was ongoing.

Conclusions

Ministry enforcement has been effective at detecting contraventions of the Act. Enforcement has escalated over time from verbal warnings to cancellation of the grazing licence and prosecution. However, despite its use of appropriate enforcement tools, the ministry has been ineffective at achieving compliance.

The Board also concludes that the district manager should have taken other non-enforcement actions to reduce the risks to public safety created by cattle trespassing onto White Lake Road.

Appendix 1

Hierarchy of Enforcement Options

(Undated Ministry of Forests publication)

No Action

Verbal Instructions

Compliance Notice on Inspection Reports

Compliance Notice on Field Inspection Forms

Warning Ticket

Suspension of a Burning Permit

Notice of Contravention

Violation Ticket

Forfeiture of Timber/Hay/Livestock

Forest Act s. 59/Range Act s. 31 Suspension

Stopwork Order

Forest Practices Code s. 117/119 Administrative Penalties

Forest Practices Code s. 118 Remediation Order

Forest Practices Code s. 48 Soil Rehabilitation Order

Forest Practices Code s. 45 Remediation Order

Performance Based Harvesting Logging Plan

Performance Based Harvesting Cutting Permit

Forest Act s. 61.1 SBFEP Deregistration

Forest Act s. 61.1 SBFEP Deregistration and Forfeiture of Deposit

Forest Act s. 56 AAC Reduction

Forest Practices Code/Forest Act/Range Act Prosecution

Criminal Code of Canada Prosecution

Cancellation

Location of Complaint Oliver Range